Fair Political Practices Commission
MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox, and Swanson

From: Lawrence T. Woodlock, Senior Commission Counsel
Luisa Menchaca, General Counsel

Subject: Prenotice Discussion of Regulations Defining Coordinated Expenditures
Repeal and Reenactment of Regulation 18225.7

Date: June 24, 2002

Introduction

Under the Act (§ 82025, regulation 18225), an "expenditure" is a payment made for a political purpose. A "contribution" is an expenditure "made at the behest of" a candidate. (§ 82015, regulation 18215.) An "independent expenditure," by contrast, is an expenditure that is *not* made to or at the behest of a candidate. (§ 82031.) The distinction between expenditures which are coordinated with a candidate, as against those not so coordinated, is fundamental to regulation of political campaigns in all jurisdictions. But while clear in principle, this distinction is often difficult to establish in the real world.

The importance of clear rules in this area is growing, due in part to Proposition 34's introduction of contribution limits in state elections. Contribution limits are thought by some to encourage the diversion of funds to expenditures by third persons on behalf of candidates, who would otherwise have received the funds directly, in the form of (larger) contributions. Third-party expenditures for or against candidates have been rising in jurisdictions all across the country, however, and it does not appear that this trend is driven exclusively by the increasing popularity of contribution limits. It is reasonable, in any event, to anticipate that spending by persons other than candidates will be an important element of campaigns in California for the foreseeable future.

Expenditures on campaign speech and thinly veiled "issue advocacy," when ostensibly made by persons other than candidates, may or may not be the products of campaigns coordinated with candidates.[1] The Commission's guidelines on what constitutes "coordination" are found in regulation 18225.7, which defines expenditures "made at the behest of" a candidate. However, the current regulation defines "made at the behest of" largely by multiplication of synonyms – such as "in cooperation, consultation, coordination, concert with" – which defer,

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[1] "Independent expenditures" (as defined at § 82031) must not only be independent, but must *expressly advocate* the election or defeat of a clearly identified candidate. Media consultants have begun in the last few years to avoid words of "express advocacy" even in candidate-sponsored advertisements, on a theory that the public reacts negatively to direct imperative speech. Expenditures by persons other than candidates, on similar advertisements promoting a candidate without words of express advocacy, cannot therefore be classified as "independent expenditures" under § 82031. No term has yet been coined for this form of candidate advocacy, and "issue advocacy" is often pressed into service, even when "issues" are highlighted only to promote a candidate.

without answering, practical questions relating to specific relationships and practices. Advice letters have been used to answer many questions relating to coordinated expenditures. For example, the *Davis* Advice Letter, No. I-90-173 (attached as Exhibit F) addressed no fewer than 18 questions on this topic. Many of these questions later resurfaced in other requests for advice, and some of them were more or less expressly addressed in the 1995 amendments to regulation 18225.7. The existence or non-existence of coordination often turns on facts unique to particular situations, and staff advice will always be an important resource for the regulated community. But a more carefully drafted regulation may reduce dependence on staff advice, as well as ease the burden on the Enforcement Division, which has at times struggled with determining whether particular conduct constitutes sufficient "coordination" to constitute a violation of the Act.

On March 13, 2002, staff held a public meeting to measure interest in refined guidelines for coordinated expenditures, and to solicit opinions on how best to approach the task, if indeed there was a consensus that the project was worthwhile. There seemed to be full agreement that better standards were needed, and that these standards should provide objective criteria defining specific conduct that did, or did not, amount to "coordination." A number of interested persons provided examples of conduct apparently not covered at all in existing regulations, suggesting that review of this subject must take into account developments in campaign practices since regulation 18225.7 was adopted in 1995.

The goal of a revised regulation would be to clarify for the regulated community and the general public where the legal lines are to be drawn – a critical step to insuring accurate disclosure of expenditures attributable to candidates, and enforcement of the Act's new contribution limits.[2] The regulation described in this memorandum, like the current regulation 18225.7, treats only coordination with candidates, and does not describe similar conduct with, for example, general purpose committees ("PACs") or persons supporting or opposing passage of ballot measures. But different kinds of activities would have to be included to describe coordination with PACs and the various persons involved in ballot measure campaigns, adding length and complexity to a regulation that, even limited to candidate campaigns, must cover a lot of ground.

The Commission may wish to promulgate similar regulations governing coordination with persons other than candidates, but staff believes it prudent first to work out the rules applicable to campaigns for elective office, and to take up special problems associated with other kinds of campaigns later. Conduct amounting to coordination with candidates will, at least in many cases, also amount to coordination with other persons or entities. Regulations tailored to those other persons can selectively incorporate appropriate rules from regulation 18225.7, while adding new or different rules as may be appropriate.

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[2] Other agencies have recently been active in this area. Last year, for example, the Federal Election Commission enacted new regulations defining coordinated expenditures, following lengthy judicial and administrative proceedings, and the Los Angeles City Ethics Commission is presently considering a similar regulation.

Current Definitions of Coordinated Expenditures

The literature on campaign legislation uses a general term, "coordinated expenditures," to include a wide variety of conduct described more particularly in the Political Reform Act, which does not employ a general term. As noted earlier, § 82031 defines "independent expenditure" to exclude expenditures "made at the behest" of a candidate. Section 85500(b) elaborates further:

> "(b) An expenditure may not be considered independent, and shall be treated as a contribution from the person making the expenditure to the candidate on whose behalf, or for whose benefit, the expenditure is made, if the expenditure is made under any of the following circumstances:
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> (1) The expenditure is made with the cooperation of, or in consultation with, the candidate on whose behalf, or for whose benefit, the expenditure is made, or any controlled committee or any agent of the candidate. (2) The expenditure is made in concert with, or at the request or suggestion of, the candidate on whose behalf, or for whose benefit, the expenditure is made, or any controlled committee or any agent of the candidate. (3) The expenditure is made under any arrangement, coordination, or direction with respect to the candidate or the candidate's agent and the person making the expenditure."

Regulation 18225.7 says much the same thing, albeit in different words:

> "(a) 'Made at the behest of' means made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request of suggestion of, or with the prior consent of. Such arrangement must occur prior to the making of a communication described in Government Code Section 82031. (b) An expenditure is presumed to be made at the behest of a candidate or committee if it is: (1) Based on information about the candidate's or committee's campaign needs or plans provided to the expending person by the candidate, committee, or agents thereof; or (2) Made by or through any agent of the candidate or committee in the course of their involvement in the current campaign. (c) An expenditure is not made at the behest of a candidate or committee merely when: (1) a person interviews a candidate on issues affecting the expending person,

> provided that prior to making a subsequent expenditure, that person has not communicated with the candidate or the candidate's agents concerning the expenditure; or (2) The expending person has obtained a photograph, biography, position paper, press release, or similar material from the candidate or the candidate's agents."

Section 85500(b) and regulation 18225.7 are the chief sources of authority for determining what is, and what is not, coordination under the Act sufficient to classify an expenditure as a contribution to the candidate, or an expenditure made independent of the candidate. Regulation 18225.7(b) states a presumption of such coordination in two specific circumstances, and subdivision (c) outlines two cases where, without more, coordination will *not* be found. This kind of concrete guidance is critical to enforcement of the Act and to decisions by members of the regulated community who want secure guidance on what the Act requires. The broadly descriptive terms otherwise found in these rules do not answer many practical questions on specific actions regarded as "coordination," "cooperation," "consultation," and the like.

A Proposed Regulation

To answer the questions left open by the current version of regulation 18225.7, staff has drafted a proposed replacement, attached to this memorandum as Exhibit A.[3] The draft regulation grew out of a number of sources. It is partly modeled on the new federal regulation governing "Coordinated General Public Political Communications," codified at 11 CFR § 100.23, attached hereto as Exhibit C. This regulation was adopted by the Federal Election Commission ("FEC") in response to a federal court decision, *Federal Election Commission v. The Christian Coalition*, 52 F.Supp.2d 48 (D.D.C. 1999), wherein the district court found parts of the FEC's prior regulation unconstitutional. The FEC chose not to appeal the district court's decision, but set about drafting its current regulation to meet the constitutional criteria laid down by that court. The court's opinion was lengthy and thoughtful; although some of its conclusions on the constitutional questions may fairly be characterized as "cautious," it can at least be said that the current federal regulation is most unlikely to fail constitutional scrutiny. [4]

During the FEC's notice and comment period, a number of proposals were advanced to add further provisions to the regulation, most notably a series of rules on specific conduct that would amount to coordination, authored by Deborah Goldberg at NYU's Brennan Center for Justice. (Exhibit D.) The FEC ultimately chose not to incorporate these suggestions, but FPPC staff found merit in several of them, which have been incorporated into the present draft regulation. Finally, the Los Angeles City Ethics Commission is considering adoption of a "coordinated expenditures" regulation, written in light of Los Angeles' experiences with non-candidate expenditures over the last election cycle. The rules under consideration in Los Angeles

[3] A copy of the regulation to be repealed is attached as Exhibit B.
[4] That portion of the opinion discussing "coordinated expenditures" is attached to this memorandum as Exhibit E.

were written with an eye to the federal regulation, state law and FPPC advice, and the Brennan Center's suggestions.

The regulation proposed by FPPC staff would replace regulation 18225.7 with a thoroughly re-drafted and expanded set of rules. Staff has reached a consensus that the attached regulation is an appropriate vehicle, both in substance and in design, for stating the Commission's views on what constitutes a coordinated expenditure. Particular rules may be added, deleted or modified on further study, but the staff's views are now sufficiently developed that a preliminary "design review" by the Commission is the next logical step.

Subdivision (a) of the proposed regulation provides that "made at the behest of" refers to expenditures made at the direction or request of a candidate, or made in coordination with a candidate. "Coordination" is then described as a general term henceforth incorporating the largely synonymous terms found throughout the Act and in former regulation 18225.7. Staff believes it convenient, at the least, to be able to speak of "coordinated expenditures" without need to list in every case all words included within the concept of "coordination." The subdivision ends with a definition of candidate agents tailored to the context of this regulation.

Subdivision (b) states the general rule that an expenditure made at the instance of a candidate, or in coordination with a candidate, is a contribution under §§ 82015 and 85500(b). Subdivision (c) lists instances where an expenditure is coordinated with a candidate. There are no presumptions or equivocations here. Subdivision (c) is intended to articulate the core definition of conduct that is in all cases "coordination." Subparts specify a variety of activities amounting to coordination; where the candidate requests that an expenditure be made, after a candidate has made decisions on details of the communication funded by an expenditure, or when the candidate has participated in negotiating details of the communication, the result of which is an agreement. Subdivision (c) replicates the provisions of the federal regulation.

Subdivision (d) is not intended to add anything to the definition of "coordination," which is fully defined in the preceding subdivision. Subdivision (d) merely adds a list of particular cases which give rise to a rebuttable presumption that an expenditure was coordinated with a candidate. These presumptions were developed in part from the Brennan Center proposals, and provide guidance to both enforcement authorities and the regulated community. The presumptions derive their legitimacy from their treatment of relatively common situations, where it is reasonable to suspect underlying conduct that would meet the definition of "coordination" if all the facts were known, and where those facts are more readily accessible to the actors themselves than to outside observers. Persons described in this subdivision are placed on notice that their actions may or may not violate the Act, but because they are close to the legal "line," they may be required to produce evidence that the expenditures at issue did not involve coordination.[5] If these rules do nothing more than educate the public on situations requiring

[5] For example, under (d)(1), a former campaign consultant might have to establish that he had had no discussions with the candidate regarding the expenditure; under (c)(2), the person making the expenditure might have to show

caution, they will further the purposes of the Act.

Finally, subdivision (e) carries over "safe harbor" provisions from the existing version of regulation 18225.7. Persons contemplating expenditures on campaign communications often base their decisions on information gleaned from candidate interviews or responses to questionnaires, and solicitation of informational materials. It should be clear that compliance with such requests, without more, cannot be characterized as candidate "coordination," and the routine nature of such activities makes it useful to expressly so state in this regulation.

The Commission's Decisions at the Prenotice Stage

1. *Should staff proceed further?*

The first question for the Commission is whether it wishes to adopt a new regulation defining coordinated expenditures. Understandings between candidates and their supporters, reached through "a wink and a nod," are always likely to evade any attempt at regulation, suggesting that the enterprise would (in some cases) be an exercise in futility. But there does seem to be a broad-based desire for better guidance in this area. The Commission has issued 87 advice letters (an average of more than one each month for nearly seven years) addressing practical questions on application of the current regulation, which is now badly out of date. When jurisdictions like Los Angeles promulgate their own rules, they look to state law for an exemplar. Local jurisdictions without their own rules can only look to state law for guidance.

2. *What sort of regulation would the Commission consider?*

If the Commission decides that a revised regulation should be adopted, does it favor an approach focused on specific activities and conduct, as in the attached draft? A regulation of this kind is most likely to provide useful, practical guidance to the regulated community, and clearer standards for enforcement authorities. These interests may explain why recent examples of regulations on this subject are constructed along similar lines. It should be noted, however, that the price of more explicit rules may be more frequent need for amendment as campaign practices continue to evolve.

Staff Recommendations

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that the retained professional was not acting on the candidate's behalf; under (c)(3), that the information was acquired from the candidate in circumstances not involving discussion of the planned expenditure; under (c)(4), that the inspiration to
reproduce the candidate's materials did not come from the candidate; under (c)(5), that discussions with the candidate involved a one-way information flow (towards the candidate), rather than two-sided negotiation leading to a change of plans at the candidate's request or suggestion. As a side note, staff is not yet convinced that subdivisions (c)(4) and (c)(5) should be included in a regulation presented to the Commission for adoption. More information is needed on the likelihood that the described conduct points to underlying coordination in a significant number of cases.

Staff recommends that the Commission consider adopting a regulation similar at least in concept to the draft attached to this memorandum. If the Commission agrees, staff will return to the Commission in September seeking either further input from the Commission on regulatory language, or repeal of the existing regulation 18225.7, and adoption of a new rule in its place.